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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PAUMA BAND OF LUISENO  
MISSION INDIANS OF THE  
PAUMA & YUIMA  
RESERVATION, a/k/a/ PAUMA  
BAND OF MISSION INDIANS, a  
federally recognized Indian Tribe,  
  
Plaintiff,  
  
v.  
  
STATE OF CALIFORNIA, *et al.*,  
  
Defendants.

Case No. 16-cv-1713-BAS-JMA  
  
**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS OR STRIKE  
PLAINTIFF'S SECOND  
AMENDED COMPLAINT**  
  
[ECF No. 30]

The State of California (“State”) and California Governor Edmund G. Brown, Jr. (“Governor Brown”) (together “Defendants”) move to dismiss or strike the twenty-first and twenty-second causes of action in the Second Amended Complaint (“SAC”) arguing: (1) the SAC exceeds the scope of the Court’s order allowing amendment, and, therefore, the twenty-second claim should be stricken; (2) the twenty-second claim fails to state a claim; and (3) Plaintiff fails to cure the twenty-first claim’s discovery rule defects. (ECF No. 30.) Plaintiff Pauma Band of Luiseno

1 Mission Indians of the Pauma and Yuima Reservation (“Pauma” or “Plaintiff”)  
2 opposes. (ECF No. 32.) For the reasons stated below, the Court **DENIES** the Motion  
3 to Strike or Dismiss the twenty-second claim, but **GRANTS** the Motion to the extent  
4 it seeks to limit the claim to breaches that occurred more than four years before this  
5 action commenced.

## 6 7 **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

8 On March 29, 2017, this Court issued an Order granting in part and denying in  
9 part Defendants’ Motion to Dismiss the twenty-first claim of Plaintiff’s First  
10 Amended Complaint (“FAC”) for failure to state a claim. (ECF No. 26.) The  
11 underlying facts of this action are laid out in the Background section of that Order,  
12 and the Court incorporates that section as part of this Order.

13 The twenty-first claim alleges a breach of the 1999 Pauma Compact through  
14 the misuse of Special Distribution Fund (“SDF”) funds. Notably, the Court found  
15 that Plaintiff could pursue recovery for any of these breaches that occurred within the  
16 four-year statutory limitations period under the “continuous accrual” rule. (ECF No.  
17 26 at 14.) However, the Court rejected Plaintiff’s argument that any breaches that  
18 occurred more than four years before this action commenced should also be allowed.  
19 Although Plaintiff argued it neither knew nor had reason to know of the injury until  
20 November of 2015, the Court concluded, “Pauma has failed to show that it engaged  
21 in the kind of due diligence necessary to assert delayed discovery.” (*Id.* at 13.) The  
22 Court also granted Defendants California Gaming Control Commission (“CGCC”)  
23 and the State of California Department of Justice Office of the Attorney General’s  
24 (“California Department of Justice”) Motion to Dismiss finding there were no  
25 allegations that these Defendants breached the Compact. (*Id.* at 15-16.) The Court  
26 gave Plaintiff leave to amend the twenty-first claim “because Pauma may be able to  
27 add allegations demonstrating that the actions of the CGCC and the California  
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1 Department of Justice have in some way breached an obligation under the 1999  
2 Pauma Compact.” (*Id.* at 16.)

3 Plaintiff now files its Second Amended Complaint. (ECF No. 27.) Plaintiff  
4 has elected not to amend to add the CGCC or the California Department of Justice  
5 back into the twenty-first cause of action. However, Plaintiff adds allegations  
6 bolstering its claim that the doctrine of delayed discovery allows it to bring claims  
7 for breaches occurring before the four-year statute of limitations period. Plaintiff  
8 also adds a twenty-second claim for breach of the implied covenant of good faith and  
9 fair dealing against the State and Governor Brown. (*Id.*)

## 10 11 **II. LEGAL ANALYSIS**

### 12 **A. Motion To Strike Twenty-Second Claim**

13 Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiff may  
14 only amend its pleading with leave of the Court. The Court gave Plaintiff leave to  
15 amend the twenty-first claim “because Pauma may be able to add allegations  
16 demonstrating that the actions of the CGCC and the California Department to Justice  
17 have in some way breached an obligation under the 1999 Pauma Compact.” (ECF  
18 No. 26 at 16.) This does not constitute leave to add additional claims.<sup>1</sup> Plaintiff  
19 should have moved the Court to amend under Rule 15 before adding another cause  
20 of action.

21 However, the Court will construe Plaintiff’s Response to the Motion to Strike  
22 as a Motion to Amend under Rule 15. The decision whether to allow amendment  
23 under Rule 15 is in the court’s discretion, although “[i]n exercising its discretion, a  
24 court must be guided by the underlying purpose of Rule 15—to facilitate decision on

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26 <sup>1</sup> The fact that the Court may have cautioned unrepresented or unsophisticated parties  
27 in the past that they were not to add additional claims just because leave to amend  
28 had been granted is of no import to this case. The Court was under the impression  
that the attorneys in this case were experienced lawyers not needing such a cautionary  
instruction.

1 the merits rather than on the pleadings or technicalities.” *DCD Programs, Ltd. v.*  
2 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quotation omitted). The court should  
3 freely give leave when justice so requires. “[T]his policy is to be applied with  
4 extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079  
5 (9th Cir. 1990). Denial of the request to amend is only proper when it “would be  
6 clearly frivolous, unduly prejudicial, cause undue delay or a finding of bad faith is  
7 made.” *United Union of Roofers, Waterproofers & Allied Trades No. 40 v. Ins. Corp.*  
8 *of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990).

9 In this case, the requested amendment is made early in the litigation. It does  
10 not add additional facts that are not already laid out in the rest of the Complaint.  
11 Therefore, Defendants are not unduly prejudiced by the addition. There is no  
12 evidence that the addition was made in bad faith. And, as discussed below, the request  
13 to amend is not clearly frivolous. Therefore, the Court allows Plaintiff to amend  
14 pursuant to Rule 15, and the Motion to Strike is **DENIED**.

## 15 16 **B. Motion To Dismiss The Twenty-Second Claim**

17 The newly added twenty-second claim alleges that the 1999 Compact and 2004  
18 Amendment, which form the substance of the breach of contract claim in the twenty-  
19 first cause of action, require that the State use the SDF funds paid by gaming tribes  
20 only in a certain specified manner. Pauma claims that Defendants have “largely  
21 blocked from view” “the information concerning the administration of the SDF” and  
22 that the State does not even allow discovery under the California Public Records Act.  
23 (SAC ¶ 318.) Thus, by not disclosing how the funds were used, Pauma alleges that  
24 the State and Governor Brown breached the covenant of good faith and fair dealing.

25 Defendants argue that the Court should dismiss the twenty-second claim for  
26 failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.  
27 In particular, defendants argue somewhat contradictorily that: (1) Pauma does not  
28 adequately allege a breach of the covenant of good faith and fair dealing because

1 Pauma does not allege any contractual obligation requiring Defendants to disclose or  
2 specify the use of the SDF funding and (2) the claim is superfluous because the  
3 twenty-first claim alleging breach of contract already alleges that Defendants  
4 breached any contractual obligation.

5 Under the law applicable to this case, “all contracts contain an implied  
6 covenant of good faith and fair dealing.” *San Jose Prod. Credit Ass’n v. Old Republic*  
7 *Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984) (internal quotations omitted). “This  
8 covenant requires each contracting party to refrain from doing anything to injure the  
9 right of the other to receive the benefits of the agreement.” *Id.* (internal quotations  
10 omitted).

11 A plaintiff who pleads both breach of contract and breach of the implied  
12 covenant of good faith and fair dealing claims “must allege an implied duty that is  
13 consistent with the express contractual terms, but base its implied covenant theory  
14 on allegations that are distinct from the factual predicate for its contract claims.”  
15 *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, No. 08 Civ. 9116 (PGG), 2009  
16 U.S. Dist. LEXIS at \*11 (S.D.N.Y. Feb. 9, 2009) (applying similar New York law);  
17 *Johnson v. Regents of the Univ. of Calif.*, No. C-09-04727 JCS, 2010 U.S. Dist.  
18 LEXIS 63963 at \*20 (N.D. Cal. June 28, 2010) (stating that, if the allegations in the  
19 breach of implied covenant do not go beyond that alleged in the breach of contract  
20 claim, “they may be disregarded as superfluous” (quoting *Careau & Co. v. Sec. Pac.*  
21 *Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1393 (1991))). “While independent  
22 obligations beyond those stated in the contract will not be inferred, a plaintiff  
23 adequately states an implied covenant claim by alleging conduct that subverts the  
24 contract’s purpose without violating its express terms.” *JP Morgan Chase Bank*,  
25 2009 U.S. Dist. LEXIS at \*16. The issue of duplication between a breach of contract  
26 claim and a claim for breach of the covenant of good faith and fair dealing is generally  
27 resolved at the summary judgment stage. *Johnson v. Regents*, 2010 U.S. Dist. LEXIS  
28 63963 at \*21.

1 In Plaintiff's claim for breach of contract, Plaintiff alleges that the State has  
2 used the SDF funds improperly and that this use violates the 1999 Compact and 2004  
3 Amendment. (SAC ¶¶ 311-315.) In the new claim for breach of the covenant of good  
4 faith and fair dealing, Plaintiff adds that the State and Governor Brown have blocked  
5 from view any information concerning the administration of the SDF, and that this  
6 information is "not even discoverable" under the California Public Records Act.  
7 (SAC ¶ 318.) According to the SAC, this prevented Pauma from receiving the benefit  
8 of its contract because it was unable to monitor how the State was using the SDF  
9 funds. These allegations sufficiently walk the line between inferring new  
10 independent obligations and duplicating what has already been alleged in the breach  
11 of contract claim. To the extent Defendants argue that they are not required to  
12 disclose this information or that these allegations are duplicative of the underlying  
13 breach of contract claim, this is better resolved at the summary judgment stage.

### 14 15 **C. Motion To Dismiss In Part The Twenty-First Claim**

16 The Court already granted a motion to dismiss the FAC in part, ruling that  
17 Plaintiff could not recover for breaches that occurred more than four years before this  
18 action commenced. In the SAC, Plaintiff now attempts to allege sufficient facts to  
19 justify application of the "delayed discovery" rule.

20 As stated in the Court's previous Order (ECF No. 26), the statute of limitations  
21 begins to run when "the plaintiff knows or has reason to know of the injury that is  
22 the basis of the action." *N. Cal. Retail Clerks Unions & Food Emp'rs Joint Pension*  
23 *Tr. Fund v. Jumbo Mkts, Inc.*, 906 F.2d 1371, 1372 (9th Cir. 1990). However, "a  
24 plaintiff who did not actually know of his claim will be barred 'if he should have  
25 known [of it] in the exercise of due diligence.'" *O'Connor v. Boeing N. Am., Inc.*,  
26 311 F.3d 1139, 1147 (9th Cir. 2002) (alteration in original) (quoting *Bibeau v. Pac.*  
27 *Nw. Research Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999)). Parties to a contract  
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are required to exercise reasonable due diligence in investigating potential breaches.  
*O'Connor*, 311 F.3d at 1147.

The Court previously found that Pauma failed to allege that it exercised due diligence in discovering any potential breach, particularly after it was required to enter into a Memorandum of Understanding with the State because of funding shortfalls in 2004. (ECF No. 26.) The Court pointed out that Pauma did not investigate until over ten years after this 2004 amendment. (*Id.*)


Pauma now attempts to remedy this deficiency, detailing how difficult it is to get information about the use of the SDF funds. (SAC ¶¶ 189-193.) Notably absent, however, are any allegations of actions Pauma took to attempt to get this information or actions that could constitute due diligence to learn of the breaches until more than ten years after the 2004 Amendment. For the same reasons detailed in its previous Order, the Court finds Pauma has failed to allege sufficient facts to show due diligence and, therefore, any claims outside the four year statute of limitations are barred.

### III. CONCLUSION & ORDER

For the reasons stated above, Defendants' Motion to Dismiss or Strike (ECF No. 30) is **GRANTED IN PART AND DENIED IN PART**. The Motion to Strike or Dismiss the twenty-second cause of action is **DENIED**. The Motion to Dismiss for claims in the twenty-first cause of action occurring more than four years before this action was brought is **GRANTED WITH PREJUDICE**.

**IT IS SO ORDERED.**

**DATED: November 6, 2017**

  
**Hon. Cynthia Bashant**  
**United States District Judge**